STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2003
v	No. 232386 Oakland Circuit Court
PETER RODRIGUEZ APONTE, Defendant-Appellant.	LC No. 1999-169670-FC

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life imprisonment for the murder conviction and eighteen to thirty years each for the armed robbery and conspiracy convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions. He appeals as of right. We vacate defendant's armed robbery conviction and attendant felony-firearm conviction, but affirm in all other respects.

Defendant first argues that the trial court erred in allowing the prosecutor to introduce at trial a portion of his wife's preliminary examination testimony. The court allowed the prosecutor to introduce the portion of the preliminary examination testimony up to the point where defense counsel objected on the basis of the spousal privilege, MCL 600.2162. We agree that the court erred in allowing the testimony, but conclude that the error was harmless.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). However, a decision concerning whether there has been a waiver of privilege is an issue preliminary to the admissibility of evidence and, therefore, is reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Further, even when there has been a preserved evidentiary error, reversal is not warranted unless the defendant demonstrates that it is more probable than not that the error resulted in a miscarriage of justice. *Id*. at 494-495.

It appears that the trial court admitted the challenged testimony on the ground that a timely objection had not been made. To be timely, an objection should ordinarily be interposed

between the question and the answer. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). In this case, however, counsel's failure to immediately object was understandable. There is no question that defendant's wife's testimony was admissible against his codefendants in their joint preliminary examination. Further, when the issue was raised, it is apparent that all parties and the court understood that the testimony was not admissible against defendant without his consent and that the testimony was being accepted with that understanding. Under these circumstances, it was disingenuous for the prosecutor to later seek to use the testimony against defendant. We conclude that, under the circumstances, the prosecutor waived the argument that the testimony could be used against defendant because he failed to object immediately. See *People v Hamacher*, 432 Mich 157, 167-168; 438 NW2d 43 (1989).[1]

Nonetheless, we do not believe that the error requires reversal. The principal significance of defendant's wife's testimony was that she was the only witness to testify concerning what time each of the men came home, that defendant and Juan Santiago arrived separately, and that defendant had unexplained possession of $600 on the day after the crime. Apart from defendant's wife's testimony, however, David Santiago testified that defendant, Hector Santiago, and Juan Santiago picked him up on the morning in question, at which time defendant had a revolver and told David that they were going to rob the victim and, if the victim resisted, he was going to shoot him. Also, Ruben's testimony established a timeframe for the killing, and Mr. Chittick observed defendant on the victim's street during that timeframe. Additionally, defendant gave a statement wherein he admitted going to the victim's house on the morning of the killing, and he was photographed by a security video camera at a gas station in the vicinity of the victim's home. Further, Edwin Marraro testified that defendant admitted his involvement in robbing and shooting the victim, and offered Marraro $10,000 to kill David. Marraro also testified that defendant said he used a .357 gun to shoot the victim, and the police found ammunition for a .357 gun on a bed in the basement of defendant's home. When defendant's wife's testimony is considered in the context of the weight and strength of the untainted evidence received at trial, it is not more probable than not that a different outcome would have resulted without her testimony. See *Lukity*, *supra* at 495, 497. Therefore, reversal is not required.

Defendant next argues that the trial court erred in denying his motion to suppress a witness' identification of him at a photographic lineup and at the preliminary examination. During closing argument, defense counsel conceded that defendant was one of the persons seen by the witness. We view this concession as a waiver of any error. An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); see, also, *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000). Even if the issue had not been waived, the record demonstrates that

[1] In *Hamacher*, the Supreme Court declined to consider the prosecutor's alternative argument that the defendant had waived the marital communications privilege by failing to assert it when defendant's spouse testified at his preliminary examination. *Hamacher*, *supra* at 167-168. The Court found that, because the prosecutor had not raised the waiver argument at trial or during either of his appearances before this Court, the issue was unpreserved. *Id*. at 168. Unlike in the present case, the prosecutor in *Hamacher* repeatedly failed to raise the waiver issue. However, we know of no requirement that an issue be waived repeatedly in order for a waiver to be effective.

the police attempted to arrange for a corporeal lineup, but were unable to do so because there were not a sufficient number of persons available with defendant's physical characteristics. Under these circumstances, a photographic lineup was permissible. See *People v Anderson*, 389 Mich 155, 186-187, n 22; 205 NW2d 461 (1973).

Next, defendant argues that the prosecutor committed misconduct during closing argument by referring to a codefendant's statement that had not been introduced into evidence. Claims of prosecutorial misconduct are generally reviewed on a case by case basis and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Here, however, because defendant failed to object to the challenged remarks below, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A prosecutor may not argue the effect of testimony that was not entered into evidence at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, it is clear from the context of the prosecutor's remarks that the prosecutor meant to refer to David Santiago, not Juan Santiago, when rebutting defense counsel's argument that all of the family members involved in this case were protecting and covering for each other. Because the prosecutor's misstatement was not calculated to mislead the jury, we conclude that it did not affect defendant's substantial rights. Accordingly, this unpreserved issue does not warrant reversal.

Defendant next argues that the trial court abused its discretion by admitting evidence that one of his codefendants left the jurisdiction after the crime.

Defendant was charged with first-degree felony murder and armed robbery as both a principal and an aider and abettor. He was also charged with conspiracy to commit armed robbery. To convict a defendant on an aiding and abetting theory, the prosecution needed to show that defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and that he either intended to commit the crime or knew that the principal intended to commit the crime at the time he gave aid or assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). "[A] close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime" are all appropriate considerations when deciding a defendant's guilt as an aider and abettor *Turner, supra* at 569.

Although Michigan recognizes the equivocal nature of evidence of flight, such evidence is generally considered relevant and admissible. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), overruled in part on other grounds in *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996); *People v Clark*, 124 Mich App 410, 413; 335 NW2d 53 (1983). In this case, Juan Santiago was one of defendant's alleged coconspirators. There was substantial evidence that the two men were together at the time the victim was killed. The evidence indicated that Juan worked for the victim, but had not been paid before the victim was killed.

Juan had an unexplained amount of cash in his possession immediately after the killing. Further, David's testimony established a conspiracy to rob the victim and, if necessary, kill him. Evidence of Juan's flight was relevant to show consciousness of guilt on his part and, thereby, tended to corroborate the existence of the alleged conspiracy. Therefore, it was relevant and material, and its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. The court did not abuse its discretion in admitting the evidence at trial.

Alternatively, defendant argues that the trial court erred in failing to give an appropriate instruction concerning the flight evidence. Claims of instructional error are generally reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Because defendant did not request the omitted instruction, however, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

Although the trial court did not give CJI2d 4.4, it instructed the jury that,

> [i]n deciding whether there was an agreement to commit the crime, you should think about all the members of the alleged conspiracy -- how all the members of the alleged conspiracy acted and what they said, as well as all other evidence. . . . [Y]ou may infer that there was an agreement from the circumstances, such as how members of the alleged conspiracy acted, but only if there is no other reasonable explanation for those circumstances. . . . Members of a conspiracy are not responsible for what other members do or say after the conspiracy ends.

Use of Standard Criminal Jury Instructions is not mandated; however, the instructions must fairly and adequately protect the defendant's rights and cover the basic and controlling issues in the case. *People v Mixon*, 170 Mich App 508, 517-518; 429 NW2d 197 (1988), modified on other grounds 433 Mich 852 (1989). Here, viewed as a whole, the court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. See *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Consequently, defendant has failed to establish that the court's failure to give CJI2d 4.4 amounted to plain error affecting his substantial rights.

Defendant next argues that his dual convictions of both felony murder and armed robbery violate his constitutional protections against double jeopardy. We agree.

Whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). Our Supreme Court has held that it is violation of double jeopardy to convict a defendant of both felony murder and the predicate felony. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). In this case, defendant's felony murder conviction was predicated on the lesser offense of larceny from the person, MCL 750.357, not armed robbery. However, because these two offenses arose from a single course of criminal conduct, and because larceny from the person is a necessarily lesser included offense of armed robbery, *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds in *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002); see, also, *People v Harding*, 443 Mich 693, 702; 506 NW2d 482 (1993), relying on *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977), we regard these two offenses as the same for double jeopardy purposes. Thus, when defendant was convicted and sentenced for armed robbery, he was in effect convicted and sentenced for both felony

murder and the predicate felony. Accordingly, we vacate defendant's convictions and sentences for armed robbery and the attendant felony-firearm conviction. See *Harding*, *supra* at 716-717, 720.

Affirmed in part and vacated in part.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper